

**BEFORE**

**THE PUBLIC SERVICE COMMISSION**

**OF SOUTH CAROLINA**

**Docket No. 2017-292-WS**

<b>In Re:</b>	)	
	)	
<b>Application of Carolina Water Service,</b>	)	<b>SUPPLEMENTAL MEMORANDUM IN</b>
<b>Inc. for Approval of an Increase in its</b>	)	<b>SUPPORT OF PETITION FOR</b>
<b>Rates for Water and Sewer Services</b>	)	<b>REHEARING OR RECONSIDERATION</b>
	)	
	)	

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Carolina Water Service, Inc. (“CWS” or “Company”)<sup>1</sup>, pursuant to S.C. Code Ann. §58-5-330 submits this supplemental memorandum and exhibits in support of its pending Petition for Reconsideration (“CWS Petition”).

**BACKGROUND**

This proceeding was initiated when CWS filed an application for a rate increase in November 2017. Following an evidentiary hearing in April 2018, the South Carolina Public Service Commission (“Commission”) issued Order No. 2018-345(A) granting a portion of the rate increases sought by CWS. In June 2018 ORS filed a petition for rehearing or reconsideration asking that the Commission reconsider six specific issues ruled on in Order No. 2018-345(A). In response to the ORS petition for reconsideration, the Commission issued Order No. 2018-494 granting rehearing on four of the six issues raised by ORS, including the litigation expense issue which is the subject of the CWS Petition. Following the rehearing, the Commission issued Order No. 2018-802. Among other rulings, Order No. 2018-802 ruled on recovery of litigation expenses differently from the ruling on that issue in Order No. 2018-345(A). On February 14, 2019 CWS

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<sup>1</sup> CWS has recently changed its name to Blue Granite Water Company (See Docket No. 2018-365-WS), but to avoid confusion will continue to use its former name for purposes of this proceeding.

filed its Petition with this Commission seeking rehearing and reconsideration of the ruling on recovery of litigation expenses. On February 25, 2019 CWS filed a notice of intent to appeal with the South Carolina Supreme Court.

In response to the CWS Petition, the Office of Regulatory Staff (“ORS”) filed a motion requesting dismissal of the CWS Petition on the grounds that it was not permitted because it followed a previous order granting rehearing and because the notice of appeal divested the Commission of jurisdiction. On March 7, 2019, the Commission issued Order No. 2019-178 dismissing the CWS Petition on the ground that the notice of appeal divested the Commission of jurisdiction. On March 22, 2019 CWS filed a motion with the Supreme Court asking that the case be remanded to this Commission for reconsideration of the CWS Petition. On May 15, 2019, the Supreme Court issued an order dismissing the CWS notice of appeal, vacating Commission Order No. 2019-178 and directing the Commission to rule on the merits of the CWS Petition. CWS submits this supplemental memorandum in support of the CWS Petition and to provide the Commission with additional information relevant to the issue presented in its Petition.

### **ARGUMENT**

The CWS Petition seeks to have the Commission reconsider the recovery in its rates of expenses relating to litigation in which CWS was a party. That litigation was entitled *Riverkeeper v. Carolina Water Service*. (“*Riverkeeper*”). At the time that the CWS Petition was filed with the Commission CWS was able to inform the Commission that there were discussions about settling the *Riverkeeper* litigation, but CWS was not able to provide the Commission with any information about the terms of the settlement. The *Riverkeeper* case has now been settled and the settlement has been approved by the Federal Court. See Exhibit 1 – Consent Order and Final Judgment and Exhibit 2 – Final Settlement Agreement (“Settlement”).

CWS believes that the terms of the Settlement should be reviewed by the Commission as part of its consideration of the CWS Petition. Under the applicable statutory provision that allows for reconsideration of decisions by the Commission, events and facts occurring after the order being reconsidered are expressly allowed to serve as a basis for reconsideration. See S.C. Code Ann. §58-5-330. In this case the Settlement provides substantial benefits to the customers of CWS that should be taken into account by the Commission in considering the issues raised in the CWS Petition.

The primary issue in the *Riverkeeper* litigation concerned the difficulty that CWS faced in complying with a regulatory requirement to close its I-20 wastewater treatment plant without being able to negotiate a wholesale contract with the Town of Lexington. As a part of the Settlement CWS has negotiated an agreement with the Congaree Riverkeeper that addresses two similar situations. In the Settlement, the Congaree Riverkeeper agreed that it will support: (1) an effort by CWS to negotiate a wholesale agreement with the Town of Lexington to allow the closure of the Watergate treatment facility; and (2) a wholesale treatment agreement with the City of Columbia to allow the closure of the Friarsgate treatment facility. See Settlement (Exhibit 2) at pp. 2-3. The Riverkeeper also expressly agreed that, for a period of five years, it will not bring any legal action asserting any claims that CWS has failed to connect the Watergate or Friarsgate systems to regional wastewater system. See Settlement (Exhibit 2) at pp.2-3. CWS believes that the Settlement will help in its effort to negotiate wholesale treatment contracts with the Town of Lexington and the City of Columbia that will be beneficial to customers by obtaining treatment services on reasonable terms and by avoiding litigation.

The Settlement includes financial terms that require CWS to make certain payments to counsel for the Riverkeeper, a donation to the Central Midlands Council of Governments and a

payment to the U.S. Treasury. CWS commits that it will not seek to recover any part of those payments from its customers.

### CONCLUSION

CWS continues to believe that the Commission should rehear and reconsider Order No. 2018-802 for the reasons stated in the CWS Petition. By this supplemental memorandum CWS provides the Commission with additional information that supports and buttresses the arguments advanced in that Petition. The defense by CWS of the *Riverkeeper* litigation was reasonable and prudent, and its expenses in that litigation are fully recoverable in rates following well established regulatory principles. The Settlement now finalizes the *Riverkeeper* litigation, and it provides significant benefits to ratepayers that should be considered by the Commission as it decides the issues presented by the CWS Petition.

s/Frank R. Ellerbe, III

Frank R. Ellerbe, III

Samuel J. Wellborn

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Attorneys for Carolina Water Service, Inc.

May 21, 2019

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

CONGAREE RIVERKEEPER, INC.  Plaintiff,  vs.  CAROLINA WATER SERVICE, INC.  Defendant.	C.A. No.: 3:15-cv-194-MBS  <b>CONSENT ORDER AND FINAL JUDGMENT</b>
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Upon consideration of the parties' agreement, evidenced by the endorsements of the parties in the Settlement Agreement found at ECF No. 129-2 and incorporated herein by reference, and it otherwise appearing proper to do so, it is hereby:

**ORDERED** that the agreement and settlement documented in the Settlement Agreement executed by the Plaintiff Congaree Riverkeeper, Inc. and Defendant Carolina Water Service, Inc. is hereby approved;

**ORDERED** that the revised joint motion to enter consent order and final judgment, ECF No. 129, is granted, and the joint motion to enter consent order and final judgment, ECF No. 128, is denied as moot;

**ORDERED** that this Court expressly reserves personal and subject matter jurisdiction to enforce the Settlement Agreement against all of the parties named in the Settlement Agreement, and their affiliates, representatives, assigns and successors;

**ORDERED** that this Court expressly incorporates the terms of the Settlement Agreement as part of this Order; AND

**ORDERED** that this Court finds that there is no just reason for delay pursuant to Federal Rule of Civil Procedure 54(b), and hereby enters final judgment as to Plaintiff Congaree Riverkeeper, Inc.'s claims against Defendant Carolina Water Service, Inc.

SO ORDERED AND ENTERED this 11th day of March, 2019.

s/Margaret B. Seymour  
Margaret B. Seymour  
Senior United States District Judge

Columbia, South Carolina

Exhibit 2

## **EXHIBIT 2**

### **FINAL SETTLEMENT AGREEMENT**

### SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this 14<sup>th</sup> day of February, 2019, by and between Plaintiff Congaree Riverkeeper, Inc. ("CRK") and Defendant Carolina Water Service, Inc., now known as Blue Granite Water Co. ("CWS") (collectively sometimes hereinafter referred to as the "Parties") with respect to that certain action styled *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, pending in the United States District Court for the District of South Carolina, Case No. 3:15-CV-194-MBS (the "Action").

### RECITALS

WHEREAS, CRK brought, and the Parties have been litigating, the Action, which is a citizen suit under 33 U.S.C.A. § 1365 alleging violations of the federal Clean Water Act ("CWA") arising out of the permitted discharge of treated wastewater into the Lower Saluda River by CWS from its I-20 wastewater collection, treatment and disposal system serving certain portions of Lexington County, South Carolina ("I-20 System");

WHEREAS, summary judgment has been granted to CRK in orders issued by the United States District Court ("Court") in the Action, which orders CWS would appeal if the Action is not otherwise resolved through settlement;

WHEREAS, pending in the Court are further proceedings for determination of any penalty for the Court's finding of liability for CWS's inability to obtain a connection from the Town of Lexington ("the regional facility") for the I-20 System and on the amount of attorney's fees for CRK;

WHEREAS, CRK maintains that the Court properly concluded that CWS had violated the CWA due to its failure to connect the I-20 System to the regional facility and eliminate its



discharge, and the Court would have imposed significant penalties as a result of these violations and granted CRK its attorneys' fees, CRK has nonetheless concluded, after analyzing the facts and law applicable to the Action, and taking into account the burdens, risks, uncertainties, and expense of litigation, that this Agreement is fair, reasonable, adequate, and in its best interest; and

WHEREAS, CWS maintains that it was lawfully operating the I-20 System under a valid NPDES permit and believes that it has not committed a violation of the CWA due to the unavailability of the regional facility to eliminate the permitted discharge from the I-20 System and its actions to eliminate the discharge, and without admitting that any such violation exists from its inability to connect to the regional facility, CWS has similarly concluded that this Agreement is desirable in order to resolve finally and completely this Action in both the best interest of its shareholders and customers.

NOW, THEREFORE, it is stipulated and agreed by CRK and CWS that the Action shall be fully and finally settled, resolved, and ended on the terms and conditions set forth below.

#### **I. NON-MONETARY SETTLEMENT TERMS**

##### **A. Covenant Not to Sue**

CRK agrees that it will not institute, bring, establish, or assert in any manner in any action, proceeding (including condemnations), claim, cause of action, suit, demand, penalty, fine, or enforcement effort, whether of a legal, equitable, administrative, executive, legislative or other nature ("Future Claim"), pertaining to or arising out of the fact that the CWS Watergate wastewater collection and disposal system serving certain portions of Lexington County ("Watergate System") has not been connected to the Town of Lexington's ("Town") regional facility, and/or the CWS Friarsgate wastewater collection and disposal system serving certain

portions of Richland County ("Friarsgate System") has not been connected to the City of Columbia's ("City") regional facility. CRK's release of its claims regarding CWS's failure to connect its Watergate and Friarsgate facilities shall be applicable for only 5 years from the date of the execution of this agreement. CRK further agrees that it will not suggest, encourage, counsel, advise, or in any other manner support any other person or groups of persons (including but not limited to (i) incorporated or unincorporated associations or organizations, (ii) courts, (iii) Federal, state, regional, or local governmental agencies, (iv) political subdivisions of the governing bodies thereof, (v) Federal, state, regional or local government executives or legislators, or (iv) persons or entities of any other type, form, or nature whatsoever) to threaten, support, institute, bring, establish, or assert in any manner any such Future Claim regarding the fact that the Watergate System and Friarsgate System are not connected to the Town's and City's regional facilities.

**B. Connection of Watergate System**

CWS agrees that it will undertake the following steps with respect to the elimination of the current discharges from the Watergate System:

1. CWS is seeking a wholesale service agreement from the Town for submission to the Public Service Commission of South Carolina ("PSC") for approval. Upon PSC approval of a connection agreement between CWS and the Town, and completion of this connection, CWS will eliminate the discharge from the Watergate System into Fourteen Mile Creek and operate the approved connection.

2. In the event that the Town refuses to offer wholesale treatment service to CWS for purposes of giving effect to the connection contemplated herein, or the PSC withholds approval of the contract pertaining to same, CWS agrees that it will not file

an action objecting to the Town's right to take the Watergate System through a condemnation proceeding.

**C. CRK Support for Connection of Watergate System**

CRK agrees that it will publicly support CWS's efforts to connect the Watergate System to the Town's regional facility and to eliminate the discharge as contemplated above. To comply with its obligations in this regard, CRK shall not be required to become a party to any judicial or administrative proceedings. However, CRK will provide an appropriate public statement of support for the applicable CWS initiative to achieve elimination of this discharge for dissemination to the media.

**D. Non-Disparagement/Communications about the Settlement**

The Parties agree that they will not communicate about this Agreement or the Action until the Court's approval of the Settlement Agreement. Once the Settlement Agreement is approved, the parties agree that if they desire to communicate about this Agreement or the Action, they may do so only to the extent those communications are consistent with the terms set forth in Exhibit A.

**II. MONETARY SETTLEMENT TERMS**

CWS will make the following payments within 30 days of the Court's approval of the Settlement Agreement.

**A. Payment to CRK's Counsel**

Via wire transfer, CWS will pay to CRK's counsel, Southern Environmental Law Center, the sum of Three Hundred Eighty-Five Thousand and no/100ths Dollars (\$385,000.00).

**B. Donation to the Central Midlands Council of Governments**

In furtherance of CRK's mission and purpose, CWS will donate to the Central Midlands Council of Governments ("CMCOG") the sum of Three Hundred Fifty Thousand and no/100ths Dollars (\$350,000.00) to be used for the following purposes:

1. \$250,000.00 to support water quality monitoring initiatives of the Midlands Rivers Coalition; and
2. \$100,000.00 to support the CMCOG's revisions to, and implementation of, its Section 208 Water Quality Management Plan.

Two checks from CWS payable to CMCOG in these amounts will be jointly presented to CMCOG by CRK and CWS.

**C. Payment to the United States Treasury**

CWS will pay into the United States Treasury Twenty Three Thousand and no/100ths Dollars (\$23,000.00) in full satisfaction of any obligation owed by CWS resulting from the operation of the I-20 System.

**III. EFFECT OF THE COURT'S APPROVAL OF THE SETTLEMENT AGREEMENT**

CRK agrees that the Court's approval of the Settlement Agreement will constitute, and have the identical effect, of a full and complete release of CWS from any and all liability with respect to the matters raised or that could have been raised regarding the I-20 System in the Action.

**IV. REPRESENTATIONS AND WARRANTIES**

A. CRK represents and warrants that it has all requisite corporate power and authority to execute, deliver, and perform this Agreement, that its signatory below is fully

authorized to enter into same, and that no further or additional authorization is needed for its counsel to execute and deliver this Agreement. The execution, delivery, and performance by CRK of this Agreement and the consummation by it of the actions contemplated herein have been duly authorized by all necessary corporate action. This Agreement has been duly and validly executed and delivered by CRK and constitutes its legal, valid, and binding obligation.

B. CWS represents and warrants that it has all requisite corporate power and authority to execute, deliver, and perform this Agreement, that its signatory below is fully authorized to enter into same, and that no further or additional authorization is needed for its counsel to execute and deliver this Agreement. The execution, delivery, and performance by CWS of this Agreement and the consummation by it of the actions contemplated herein have been duly authorized by all necessary corporate action. This Agreement has been duly and validly executed and delivered by CWS and constitutes its legal, valid, and binding obligation.

#### **V. MISCELLANEOUS**

A. Neither this Agreement, nor any exhibit, document, or instrument delivered as part of this Agreement, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Agreement is intended to be or shall be construed as or be deemed to be evidence of any admission or concession by CWS of any liability or wrongdoing, or of the truth of any allegation in the Complaint, or that CWS does not have viable grounds to challenge the Court's grant of summary judgment in favor of CRK, or that the Court would not have denied penalties or limited attorneys' fees consistent with the arguments that CWS made in the pending briefing, had the parties not entered into this Agreement. Nothing in this Agreement, nor any exhibit, document, or instrument delivered as part of this Agreement, nor any statement, transaction, or proceeding in connection with this

Agreement is intended to be or shall be construed as evidence of any admission or concession by CRK that the Court would not order penalties or attorneys' fees consistent with arguments that CRK made in the pending briefing had the parties not entered into this Agreement. Notwithstanding the foregoing, CWS shall have the absolute and unfettered right to use the filed Settlement Agreement in any proceeding, judicial, administrative, legislative or otherwise, to establish that the Action has ended after the Court's finding of liability but before the resolution of penalties and attorneys' fees, except that CWS or its agents and/or owners may not use this Agreement to seek vacatur of the Court's March 30, 2017 summary judgment order or of any other final order issued by this Court.

B. This Agreement, including all Exhibits attached hereto, constitutes the entire agreement by and among the Parties with regard to the subject of this Agreement, and shall supersede any previous agreements and understandings between the Parties with respect to the subject matter of this Agreement. This Agreement may not be modified or amended except in writing signed by all Parties hereto.

C. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same document.

D. Any notice, request, instruction, or other document to be given by any party to this Agreement to any other party to this Agreement shall be in writing and delivered personally, or sent by overnight delivery service, or by United States Postal Service Priority Mail, Signature Confirmation Requested, as follows:

**For CWS:**

John M. S. Hoefer, Esquire  
Chad N. Johnston, Esquire

Ms. Catherine E. Heigel  
President, Carolina Water Service, Inc.

Willoughby & Hoefer, P.A.  
P.O. Box 8416  
Columbia, SC 29202-8416

130 S. Main Street, Suite 600  
Greenville, SC 29601

Rita Bolt Barker, Esquire  
Wyche, P.A.  
P.O. Box 728  
Greenville, SC 29601

with copy to:  
Laura K. Granier, Esquire  
Vice President and General Counsel  
Utilities, Inc.  
2335 Sanders Road  
Northbrook, IL 60062

**For CRK:**

Catherine Wannamaker, Esquire  
Blan Holman, Esquire  
Southern Environmental Law Center  
463 King Street, Suite B  
Charleston, SC 29403

with copy to:  
Bill Stangler  
Congaree Riverkeeper  
1001 Washington Street, Suite 201  
Columbia, SC 29201

E. This Agreement shall be construed in accordance with South Carolina law without regard to its choice of law rules. In the event that a dispute with respect to this Agreement shall arise after the Court's approval of the Settlement Agreement, the Parties agree that the matter may be submitted to this Court for resolution under a breach of contract cause of action and no other. The Parties further agree that they shall bear their own costs in the event

that a disputed matter under the Agreement is submitted for resolution under the terms of this section.

F. The recitals set out in the preamble herein shall be deemed to have the same legal effect as if they had been set forth in the body of this Agreement and constitute consideration for terms and conditions set out herein. The headings herein, however, are used for the purpose of convenience only and are not meant to have legal effect.

G. The waiver by any Party of any breach of this Agreement or any term or condition hereof by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Agreement or any term or condition hereof.

H. This Agreement shall not be construed more strictly against one party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Parties, it being recognized that it is the result of arm's-length negotiations between the Parties and all parties have contributed substantially and materially to the preparation of this Agreement.

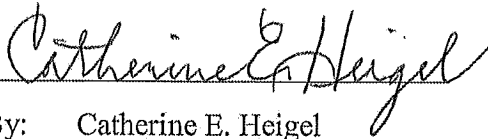
I. The Parties shall in good faith fully cooperate with each other in discharging the duties and implementing the terms of this Agreement.

J. In addition to the acts recited in this Agreement, the Parties agree to perform or cause to be performed on the date of this Agreement or thereafter any and all such further acts as may be reasonably necessary to consummate the transactions contemplated hereby.



WHEREUPON, having fully set forth their agreement, the Parties have set their hands and seals on the date first stated above.

Blue Granite Water Co.

  
By: Catherine E. Heigel

Its: President

Congaree Riverkeeper, Inc.

\_\_\_\_\_  
By: Bill Stangler

Its: Executive Director

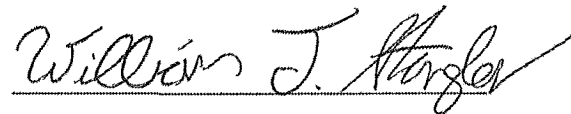
WHEREUPON, having fully set forth their agreement, the Parties have set their hands and seals on the date first stated above.

Blue Granite Water Co.

Congaree Riverkeeper, Inc.

\_\_\_\_\_  
By: Catherine E. Heigel

Its: President

  
\_\_\_\_\_

By: Bill Stangler

Its: Executive Director

EXHIBIT A  
COMMUNICATION POINTS

1. Congaree Riverkeeper, Inc. ("CRK") and Carolina Water Service, Inc., now known as Blue Granite Water Co. ("Blue Granite") have resolved the dispute between them that has been the subject of an action in the United States District Court of the District of South Carolina under the federal Clean Water Act ("Act").
2. Blue Granite disagrees with the Court's finding that it was liable for failing to connect to the Town of Lexington's regional facility or that Blue Granite could be lawfully enjoined from continuing to operate and discharge under its NPDES permit for the I-20 facility and would have appealed that decision but for this settlement. Blue Granite further believes that the Court could not have lawfully imposed penalties or attorneys' fees based on the arguments it has made about its good faith efforts to comply with the Act and inability to obtain a connection without the Town of Lexington's willingness and cooperation.
3. CRK believes that the Court properly found Blue Granite to be liable for failing to connect to the regional facility but has settled the remaining penalty and attorneys' fees issues in an effort to conclude this litigation and to ensure that penalties are spent on important water quality issues in South Carolina.
4. As part of the resolution of the dispute between CRK and Blue Granite, Blue Granite will make the following payments: (a) \$385,000 to CRK's counsel, Southern Environmental Law Center, (b) \$350,000 to the Central Midlands Council of Governments ("CMCOG") to be used to support water quality monitoring initiatives of the Midlands Rivers Coalition and CMCOG's revisions to, and implementation of, its Section 208 Water Quality Management Plan; and (c) \$23,000 to the United States Environmental Protection Agency.
5. In any communications about the Action or this Agreement, either party may reference facts established in any public document filed with the Court, including either parties' pleadings, exhibits, or other official records.